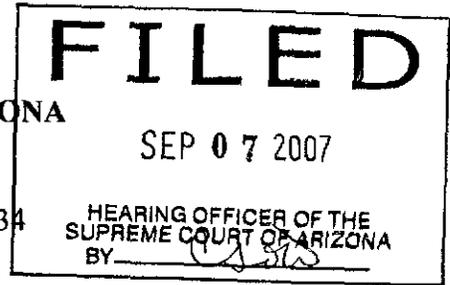


BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA)

File No 05-2134

JERRY L. COCHRAN,)
Bar No. 004539)

RESPONDENT)

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

This matter came before this Hearing Officer as a result of a Direct File of a Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent. These documents were filed on July 3, 2007, and a hearing on the agreement and tender was held on August 13, 2007, before the undersigned Hearing Officer.

FINDINGS OF FACT

At all times pertinent hereto, Respondent was a member of the State Bar of Arizona, having been admitted on October 23, 1976

COUNT ONE (File No. 05-2134)

This matter involves a single count or cause number which deals with Respondent's conduct in his partnership with Mr Dahl (Cochran & Dahl), and failure in management and supervisory responsibilities.

1. The Hearing Officer finds that at the time of the relevant conduct, Respondent was a 50% shareholder in the law firm of Cochran & Dahl, P C ("C&D"),

which was formed on October 5, 1995, by Respondent and Mr Dahl.
Respondent and Mr Dahl, also a 50% shareholder, shared managerial authority over C&D, but pursuant to their working arrangement, Respondent and Mr Dahl were each responsible for their individual practices, clients and cases and certain non-shared expenses

2. Respondent and Mr Dahl became friends while they were classmates at the College of Law at ASU. They have known each other for over thirty years and prior to the events described below, practiced together for approximately fifteen years. At the time of the events described herein, Mr. Dahl held an "AV" rating in the Martindale-Hubbell Law Directory and was certified as a specialist in Real Estate Law by the Arizona Board of Legal Specialization.
3. Initially, C&D agreed to represent various lending entities in creating limited liability companies for their respective lending investors and to prepare loan documents on behalf of the lenders for the borrowers. The resulting loans would be administered by a mortgage broker on behalf of the lending limited liability companies.
4. C&D agreed to accumulate funds from the limited liability companies and act as "disbursement agent" to hold and disburse loan proceeds to the borrowers through C&D's trust account. Funds would only be released upon the submission of a draw request to the lender by the borrower. Between 1995 and 2005, approximately 280 loans were funded through this procedure.

- 5 Some of the loan proceeds were held in interest-bearing Money Market Accounts at National Bank of Arizona (“National Bank”), a federally insured banking institution
6. Mr Dahl took sole responsibility for opening and managing these Money Market Accounts and for documenting and disbursing draws against the appropriate loans
- 7 Thereafter, as draws against these loans would be requested by the borrower, Mr Dahl would transfer funds out of the Money Market Account into the C&D trust account and a trust account check would then be issued to the borrower
- 8 On December 7, 2005, Mr Dahl called Respondent and Mr Dahl’s paralegal into his office and confessed that he had taken substantial amounts of funds over a number of years from the Money Market Accounts at National Bank to support a gambling addiction Mr Dahl’s confession was precipitated because his scheme began unraveling when a client retrieved a copy of a bank statement from National Bank that apparently revealed several of Mr Dahl’s improper withdrawals
- 9 Immediately, Respondent caused the C&D trust account and all National Bank Money Market Accounts that Mr Dahl was a signatory on to be frozen until the scope of the activity could be determined, reported the matter to local law enforcement, informed the client, hired forensic accountants to evaluate the loss and reported the entire incident to the State Bar

- 10 Respondent met with City of Phoenix police officer, Sergeant Bates, on or about December 9, 2005 and gave the officer copies of the materials Mr Dahl had provided to Respondent, outlining his embezzlement of client funds
- 11 Sergeant Bates informed Respondent that the City of Phoenix required the victim to complete an embezzlement report and spreadsheet package before law enforcement would move forward with the matter
- 12 A preliminary report prepared by the forensic accounts indicated that total losses could reach \$3,204,194 72
- 13 The forensic accountants documented the manner in which Mr Dahl perpetrated his embezzlement with copies of loan agreements, draw requests, fund accountings, requests for fund transfers, checks and check requests, copies of the general ledger, individual client ledgers and prepared a preliminary forensic spreadsheet
14. Both Respondent and Mr Dahl were signatories on the C&D trust account, but each assumed responsibility for balancing client ledgers and monitoring the accounts of their own individual clients C&D had a bookkeeper on staff responsible for balancing firm accounts and making monthly reports to Respondent and Mr Dahl concerning the expenses and income of the firm Mr Dahl assumed responsibility for managing the Money Market Accounts at National Bank and Respondent trusted him to do it Accordingly, Mr Dahl had exclusive control over the National Bank Money Market Accounts and neither Respondent nor the firm bookkeeper managed or monitored said accounts in any way

15. Respondent reports that Mr. Dahl indicated, and the forensic accountant's preliminary report appears to confirm, that Mr. Dahl did not take any money directly out of the C&D trust account, but instead took money only out of the Money Market Accounts. When Mr. Dahl confessed and was terminated from C&D he turned over Money Market Account statements and his personal handwritten checklists and accounting notes tracking the monthly account statements and the amounts he took from the Money Market Accounts. It appears that Mr. Dahl kept track of the amounts he was taking from the various Money Market Accounts so that when draw requests were made for disbursement of loan proceeds he would know how much money to transfer back into that account from other Money Market Accounts and from there back into the Trust Account to have sufficient funds to cover the particular draw request. Due to Mr Dahl's actions, the firm's IOLTA account balanced when Respondent conducted a monthly review of the account.

16. Respondent has identified, in retrospect, tactics Mr Dahl employed to make sure that no one else saw the National Bank Money Market Account statements Respondent indicates that he now realizes Mr. Dahl made sure he was the first in the office to see incoming mail so he could intercept the Money Market Account statements before anyone else could see them Mr Dahl also kept all Money Market Account records locked in his credenza Mr Dahl accomplished his thefts by simply writing checks to himself on the Money Market Accounts and cashing them

- 17 On March 9, 2006, Mr Dahl consented to disbarment and the Judgment and Order of Disbarment was entered on March 21, 2006
- 18 On or about September 8, 2006, the accounting report was completed and, in the final report, losses as a result of Mr Dahl's conduct were calculated at \$2,954,000, rather than \$3,204,194 72
- 19 By the time the forensic auditor completed his investigation and issued his report, the clients who were affected by Mr Dahl's conduct had begun settlement negotiations with the firm and Mr Dahl, individually, and according to Respondent, requested that the embezzlement report and the spreadsheet package not be submitted to law enforcement while the parties explored the possibility of settlement

CONCLUSIONS OF LAW

The Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz R Sup Ct , specifically

ER 5 1 Responsibilities of Partners, Managers, and Supervisory Lawyers

ER 1 15 Safekeeping Property

Rule 43 Trust Account Verification

Rule 44 Trust Accounts

CONDITIONAL ADMISSIONS

The parties submitted the following conditional admissions

Respondent's conduct violated Rule 42, Ariz R Sup Ct , specifically ER 5 1 and ER 1 15, as well as Rules 43 and 44, Ariz R Sup Ct Respondent's conduct violated ER 5 1 in that he was a member of the law firm of C&D who possessed managerial authority and he failed to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that all lawyers in the firm would conform to the Rules of Professional Conduct Respondent's conduct also violated ER 1 15 in that he failed to safeguard clients' property in the firm's possession in connection with a representation Furthermore, Respondent conditionally admits he violated the Trust Account Guidelines (the "Guidelines"), which were in effect prior to December 1, 2003, by failing to exercise due professional care in the performance of his duties under the Guidelines, failing to ensure that employees and others assisting him were competent and properly supervised, failing to maintain internal controls within his office to safeguard funds held in trust and ensure that all transactions were recorded promptly and accurately, all as required by Guidelines 1 a , 1 b , 1 c , and 1 d Lastly, Respondent personally or by failing to supervise, failed to accurately perform a monthly reconciliation of firm Money Market Accounts, and the bank and Money Market Account statements, thereby violating Guidelines 2 b , 2 d , and 2 e Such conduct also violated Rule 43 and Rule 44, Ariz R Sup Ct , effective as of December 1, 2003

Based on Respondent's explanation of the history of the occurrences and supporting documentation provided, the parties agreed for purposes of the consent agreement that Respondent's conduct was not "intentional" or "knowing" as contemplated by the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards") but was instead "negligent "

The parties agreed for purposes of the agreement that Respondent has undertaken efforts to remedy the effects of Mr Dahl's misconduct as follows

- a. To the extent that injured clients and affected third parties do not receive full restitution as a result of Respondent's errors and omissions from his insurance carrier, from funds provided by benefactors of Mr Dahl, or from some other source, Respondent will pledge his personal assets to effect restitution to the injured clients and third parties to the extent required by any civil judgment rendered against the Respondent personally
- b. Respondent has cooperated fully with the clients and injured third parties in submitting their claims to his firm's insurance carrier
- c. Respondent has cooperated fully with the client and third-party borrowers to limit any consequential harm to business activities of the C&D escrow accounts

ABA STANDARDS

In determining the appropriate sanction, the Hearing Officer considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and Arizona case law. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. See *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.2d 764, 770, 772 (2002), *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990). The *Standards* do not account for multiple charges of misconduct. The ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of

misconduct among a number of violations *Standards*, p 6, *In re Redeker*, 177 Ariz 305, 868 P 2d 318 (1994)

In determining the appropriate sanction, the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors See *Peasley*, 208 Ariz at 35, 90 P 3d at 772, *Standard 3 0*

The Hearing Officer finds that the most serious misconduct in this case to be Respondent's failure to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that all lawyers in the firm conformed to the Rules of Professional Conduct

The Hearing Officer finds that *Standard 7 0*, Violations of Other Duties Owed as a Professional is the most appropriate standard *Standard 7 0* provides.

Absent aggravating or mitigating circumstances, upon application of the factors set forth in *Standard 3 0*, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional conduct

7 3

Reprimand (censure) is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system

Based upon the conditional admissions in this matter, the Hearing Officer finds the presumptive sanction with regard to the most serious admission of misconduct under *Standard 7 0* appears to be a censure

A. The duty violated

As described above, Respondent failed to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that all lawyers in the firm conformed to the Rules of Professional Conduct. Respondent admitted that his conduct, taken as a whole, has violated his duty to his clients and as a professional

B. The lawyer's mental state

The Hearing Officer finds that Respondent's conduct was negligent in that he was unaware that Mr. Dahl was stealing money from the Money Market Accounts, which Mr. Dahl solely managed

C. The extent of the actual or potential injury

The Hearing Officer finds that Respondent's conduct in this matter caused actual injury to the clients as a result of Respondent's failure to ensure that measures were in effect in the firm, which would have prevented Mr. Dahl from stealing the clients' funds from the Money Market Accounts without detection

D. The aggravating and mitigating factors

Aggravating Factors

The Hearing Officer finds the following factors should be considered in aggravation

. *Standard 9 22(i) – substantial experience in the practice of law*

Respondent has been an attorney in Arizona for twenty years,

- . *Standard 9 22(a) – prior disciplinary offense* Respondent received a censure in 2006 for filing a pleading in Utah where he was not admitted to practice law

Mitigating factors

The Hearing Officer finds that the following factors should be considered in mitigation.

- . *Standard 9 32(b) – absence of a dishonest or selfish motive* Respondent's conduct did not involve any behavior which would have indicated he was motivated by a pecuniary interest,
- . *Standard 9 32(d) – timely good faith effort to make restitution or to rectify consequences of misconduct* Respondent has made full disclosure to clients and affected third parties, reported to the police, and paid \$73,592.10 to a forensic CPA to audit the accounts. Respondent has also indicated that he is willing to make restitution,
- . *Standard 9 32(e) – full and free disclosure to disciplinary board or cooperative attitude toward proceedings* Respondent reported the underlying conduct in this matter to the State Bar and has cooperated with the State Bar in reaching a resolution

Restitution

Given that Mr. Dahl was the party that intentionally engaged in conversion of client funds, he should be primarily responsible for restitution to his clients. Respondent will, however, be responsible for the payment of any restitution not covered by insurance or otherwise satisfied that result from any civil judgment assessed against Respondent personally.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline *In re Wines* 135 Ariz. 203, 660 P 2d 454 (1983) and *In re Wolfram*, 174 Ariz 49, 847 P 2d 94 (1993)

The parties have agreed and the Hearing Officer agrees that Censure is the appropriate sanction in this matter

In *Matter of Collins*, SB-97-0058-D (1997), the lawyer was admitted to practice in Arizona in 1986 and was also licensed in California. While living in California, Collins took over the Arizona practice of Anthony Leone. The main practice involved debt collection. Leone had employed an officer manager for collections matters and when Collins took over, the office manager remained as collections manager in an independent contractor capacity. Although Collins primarily practiced in California, he was occasionally in the Arizona office and maintained daily contact by telephone. The officer manager and bookkeeper were given signatory authority of the firm's accounts to facilitate the collection and transfer of funds into the appropriate accounts. Within the first three months, funds collected for six clients were embezzled by the office staff without Collins' knowledge. When Collins learned of the misappropriation he took immediate action by notifying the State Bar, cooperating with the authorities in the prosecution of the office staff and made complete restitution to the affected clients. In aggravation, prior discipline and vulnerable victims were found. The case presented the following mitigation: no dishonest or selfish motive, immediate remedial action upon

discovery of the misappropriations, and making restitution. Collins received a censure for violations of ER 1.15, ER 5.3, and Rules 43 and 44, Ariz R Sup.Ct

In *Matter of Heldenbrand* SB-99-0089-D (2000), Heldenbrand was negligent in supervising his employees and he failed to safeguard client property. Heldenbrand acknowledged that he should not have delegated administrative responsibility for client files and their accounts. Heldenbrand consented to a censure for violations of ER 1.3, ER 1.4, ER 1.15, ER 5.3, ER 5.4, ER 8.4 and Rules 43 and 44, Ariz R Sup Ct. There were no aggravating factors present in this matter and five factors present in mitigation: no prior discipline, no dishonest or selfish motive, timely good faith effort to make restitution, full and free disclosure, and mental disability or chemical dependency. Heldenbrand was censured and placed on probation for a period of two years.

In *Matter of Clark*, SB-03-0157-D (2004), Clark received a censure and a six-month term of probation for violations of ERs 1.15, 5.3 and Rules 43 and 44, Ariz R Sup Ct. Respondent failed to supervise his office manager, who had complete control of Respondent's trust account, bank statements, checks, deposit slips, account ledgers, credit card statements and signature stamp. By not having internal procedures in place to safeguard client property, Respondent's office manager was able to embezzle client funds over a period of time. The Commission found, however, that Clark had enjoyed a seventeen-year employment relationship with his employee and had no reason to mistrust her. In mitigation, Respondent had no prior discipline, the conduct giving rise to the matter was not the product of selfish or dishonest motive, Respondent made a full and free disclosure to the State Bar and made a timely good faith effort to make restitution to the affected clients. No aggravating factors were found.

The parties submit, and the Hearing Officer agrees, that the following sanction meets the goals of the disciplinary system, will serve to protect the public, instill public confidence, deter other lawyers from similar conduct, and maintain the integrity of the Bar.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993) It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P 2d 1297 (1985) Yet another purpose is to instill public confidence in the Bar's integrity. *Matter of Horwitz*, 180 Ariz 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

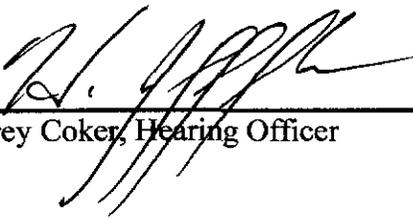
Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionality analysis, this Hearing Officer recommends the following

1. Respondent shall receive a public censure for violations of Rule 42, Ariz.R.Sup.Ct , specifically ER 5.1, ER 1.15 and Rules 43 and 44, Ariz.R.Sup Ct.

2. Respondent shall be placed on probation for two years under the following terms and conditions.
 - a. Probation shall be effective as of the date of the judgment and order of the Supreme Court herein, provided that the term of probation will be automatically extended so as to remain in effect for two years from the date of the signing of a probation agreement with the State Bar;
 - b. Respondent must submit to an assessment of his office management procedures for the above-stated rule violations by the Law Office Management Assistance Program (“LOMAP”) and enter into a probation agreement incorporating all recommendations of the director of LOMAP or her designee;
 - c. Respondent must attend the Trust Account Ethics Enhancement Program (TAEHP) within six months of the judgment and order of the Supreme Court and thereafter submit to periodic review of his trust account management procedures by LOMAP staff or by the trust account examiner of the State Bar, as may be determined at the conclusion of the LOMAP assessment. Such trust account review will include a review of Respondent’s monthly three-way reconciliation of his general ledger, client ledgers and bank statement as well as any additional supporting documentation reasonably necessary.
3. Respondent shall pay all costs and expenses incurred in these disciplinary proceedings within 30 days of the Supreme Court’s final judgment and order, pursuant to Ariz.R Sup Ct 60(b).

4. In the event that the State Bar of Arizona receives information that Respondent has failed to comply with any of the foregoing terms, Bar Counsel shall file a Notice of Noncompliance with the imposing entity pursuant to Rule 60(a)(5)(C), Ariz R.Sup Ct. The matter may be referred to a hearing officer who may hold a hearing within thirty (30) days from the date of the notice to determine if the terms of probation have been violated. The hearing officer shall determine whether the terms of probation have been breached and, if so, to recommend appropriate action and response to such breach. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

DATED this 7 day of Sept, 2007



H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 7th day of September 2007

Copy of the foregoing mailed
this 7th day of September, 2007, to.

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